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In the Supreme Court of the United States

OCTOBER TERM, 2003

STATE OF TENNESSEE, PETITIONER,

v.

GEORGE LANE, BEVERLY JONES, AND UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR AMICI CURIAE PARALYZED VETERANS OF AMERICA, AMERICAN PSYCHIATRIC ASSOCIATION, AND 23 OTHER ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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National Alliance for the Mentally Ill
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National Association of Councils
on Developmental Disabilities
National Council on Independent Living
National Health Law Program
National Mental Health Association
National Mental Health Consumers'
Self-Help Clearinghouse
National Multiple Sclerosis Society
Paralyzed Veterans of America
Tennessee Disability Coalition
United Cerebral Palsy Associations, Inc.

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INTEREST OF THE AMICI CURIAE

Amici curiae are twenty-five associations of people with disabilities, public interest groups, professional organizations, and other organizations that advocate for the rights of people with disabilities, including AARP, American Association on Mental Retardation, American Council of the Blind, American Diabetes Association, American Occupational Therapy Association, American Psychiatric Association, The Arc of the United States, Association on Higher Education and Disability, Bazelon Center for Mental Health Law, Alexander Graham Bell Association for the Deaf and Hard of Hearing, Depression and Bipolar Support Alliance, Easter Seals, The Epilepsy Foundation®, Lambda Legal Defense and Education Fund, Inc., National Alliance for the Mentally Ill, National Association for Rights Protection and Advocacy, National Association of Councils on Developmental Disabilities, National Council on Independent Living, National Health Law Program, National Mental Health Association, National Mental Health Consumers' Self-Help Clearinghouse, National Multiple Sclerosis Society, Paralyzed Veterans of America, Tennessee Disability Coalition, and United Cerebral Palsy Associations, Inc. These organizations, the interests of which are described in greater detail in the Appendix, wish to ensure that the Court is fully apprised of the extensive evidence of the States' patterns of unconstitutional treatment of people with disabilities supporting Congress' abrogation of Eleventh Amendment immunity for violations of Title II of the Americans with Disabilities Act ("ADA").[1]

1. The parties have consented to the filing of this brief under S. Ct. R. 37.2, and their letters of consent have been lodged with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

State governments have compiled a reprehensible, decades-long record of unconstitutional treatment, including deprivations of fundamental rights, of Americans with a broad range of physical or mental disabilities—a record that Petitioner and its supporting *amici* do not seriously contest. To redress such treatment, Congress expressly invoked the full "sweep of Congressional authority, including the power to enforce the Fourteenth Amendment[,]" when it enacted the ADA. 42 U.S.C. § 12101(b)(4). Congress enacted Title II of the ADA against a backdrop that included ample evidence that States were unconstitutionally excluding people with disabilities from voting and from accessing the judicial system, prohibiting them from marrying and raising families, warehousing them in institutions in deplorable conditions, and otherwise systematically, irrationally, and intentionally depriving them of the rights guaranteed by the Fourteenth Amendment. Unfortunately, regular instances of such unconstitutional State behavior persist even today.

Undersigned *amici* anticipate that Respondents and the United States will detail the extensive evidence of State-sponsored unconstitutional treatment of people with disabilities contained in Congress' legislative record. This brief, therefore, describes the compelling history of State unconstitutional conduct found in judicial decisions and the public record. The examples in this brief, although necessarily limited by space constraints, confirm what is also plain in Congress' specific statutory findings and in the legislative history: Congress properly exercised its power under § 5 of the Fourteenth Amendment when it abrogated the States' Eleventh Amendment immunity for violations of Title II of the ADA, and Title II represents a congruent and proportional response to the longstanding pattern of State constitutional violations.

ARGUMENT

I.

TITLE II OF THE ADA PROTECTS A SIGNIFICANTLY BROADER RANGE OF CONSTITUTIONAL RIGHTS THAN DOES TITLE I

The "first step" in analyzing the constitutionality of Congress' abrogation of Eleventh Amendment immunity "is to identify with some precision" the scope of the constitutional right at issue. *Board of Trustees of the University of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001). Title II of the ADA protects a different, and significantly broader, range of constitutional rights than the Title I provisions that this Court analyzed in *Garrett*. Title I encompasses only discrimination in employment. Title II, in contrast, applies directly and explicitly to States, and encompasses a broad range ofState conduct in the provision of public services and benefits.[2]

Garrett found that State discrimination against people with disabilities in employment matters is constitutional unless the State's action lacks a rational basis. *Id.* at 365–367 (citing *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)). The Court recognized, however, that a separate analysis of the scope of the constitutional right at issue would be appropriate under Title II. *Id.* at 360 n.1 ("Title II * * * has somewhat different remedial provisions" from Title I; declining to address applicability of Title II to issue before the Court).

As is evident from Congress' statutory findings, 42 U.S.C. § 12101(a), the sphere of conduct regulated under Title II implicates a number of constitutional rights with heightened substantive protection—the rights to vote, to marry, to access the courts, and the like. Accordingly, in addition to the type of equal protection/rational basis claims

2. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "[P]ublic entit[ies]" include States and State instrumentalities and agencies. *Id.* § 12131(1)(A).

at issue in *Garrett* and *City of Cleburne*, the "history and pattern" of State-sponsored unconstitutional behavior that Congress examined in enacting Title II properly "encompasse[d] various due process-type claims with varying standards of liability." *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 813 (6th Cir.), cert. denied, 537 U.S. 812 (2002).

Assessment of many of the due process and equal protection-type violations encompassed within Title II requires heightened scrutiny because, in contrast to the discriminatory employment practices at issue in *Garrett*, many Title II violations involve the exercise of fundamental constitutional rights. When a due process claim involves a right that this Court has deemed fundamental, it is well settled that the Fourteenth Amendment's due process clause includes "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno* v. *Flores*, 507 U.S. 292, 301–302 (1993); *City of Cleburne*, 473 U.S. at 440 (heightened scrutiny justified "when state laws impinge on personal rights protected by the Constitution"). It is equally well settled that when differential State treatment challenged under the equal protection clause impinges on a fundamental constitutional right, the discrimination is assessed under a strict scrutiny, not a rational basis, standard. *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988).

Accordingly, the "history and pattern" of State-sponsored discrimination underlying Title II includes not only irrational differential treatment of people with disabilities—although there is plenty of such conduct to be found—but also unconstitutional State conduct with respect to people with disabilities and their fundamental constitutional rights. As this Court concluded in *Nevada Dep't of Human Resources* v. *Hibbs*, 123 S. Ct. 1972, 1982 (2003), legislation is more readily sustained under the Fourteenth Amendment when it serves to secure constitutional rights warranting heightened scrutiny, because Congress can more readily find a pattern of conduct that fails the more

demanding constitutional standards.

II.
THE LEGISLATIVE RECORD CONFIRMS CONGRESS' SPECIFIC FINDINGS OF UNCONSTITUTIONAL DISCRIMINATION BY THE STATES

The second part of *Garrett*'s analysis asks whether Congress enacted Title II in response to "a history and pattern" of unconstitutional discrimination by the States. 531 U.S. at 368. In *Garrett*, the Court noted "strong evidence" that Congress' "failure to mention States in its legislative findings *addressing discrimination in employment* reflects that body's judgment that no pattern of unconstitutional state action had been documented." *Id.* at 372 (emphasis added).

Here, exactly the opposite is true: Congress' statutory findings are "strong evidence" that Congress could, and did, identify a pattern of unconstitutional State action in the areas that it addressed in Title II. Thus, Congress' findings explicitly and unambiguously encompass discrimination in *public* areas that are *largely or entirely within the purview of the States*, as well as multiple areas that indisputably include State conduct. 42 U.S.C. § 12101(a)(3) (finding persistent discrimination against individuals with disabilities in such "critical areas" as "education,transportation, * * * institutionalization, health services, voting, and access to public services"). Congress also specifically found that the discrimination at issue was *irrational*, noting a "history of purposeful unequal treatment * * *resulting from stereotypic assumptions." *Id.* § 12101(a)(7). Based on these findings, Congress aimed Title II directly at State conduct. *Id.* § 12132.

Congress' findings command substantial deference. *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997). Congress and the courts are coequal actors with separate and different roles in our tripartite system of government. Congress is uniquely suited to make determinations based on a wider and different set of information than that available to courts adjudicating specific cases. Judicial deference to Congress' determinations recognizes Congress' skill in per-

forming its specifically legislative function. *Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 195 (1997) ("We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.") (citations omitted).

Congress' findings of State discrimination in areas encompassed by Title II are also amply supported by the ADA's legislative history—as *amici* anticipate will be detailed in the briefs for Respondents and the United States—and by the extensive examples from the judicial and public record described in Section III below. The Court need not limit its review to the specific legislative record, although that record is replete with examples of unconstitutional State conduct in the areas encompassed by Title II. *Turner*, 520 U.S. at 200, 209, 211–213 (examining evidence outside the legislative record to evaluate Congress' exercise of legislative power). This brief provides a sampling of the judicial decisions and other public materials that demonstrate that States regularly deprived people with disabilities of their constitutional rights. The Court can, and should, presume that Congress was aware of such decisions when it enacted Title II. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (courts should presume that Congress is aware of relevant legal precedents).[3] The record reveals, furthermore, that such unconstitutional behavior continues to the present day.

3. Moreover, even the numerous published decisions finding unconstitutional State behavior do not fully reflect the pervasive extent of such conduct, in light of Congress' findings of invidious and persistent social and political segregation and isolation, and the resulting powerlessness, of people with disabilities. 42 U.S.C. § 12101(a)(2), (5), (6), (7).

III.
THE STATES HAVE HISTORICALLY DEPRIVED AMERICANS WITH DISABILITIES OF THEIR CONSTITUTIONAL RIGHTS

A. *Patterns Of Unconstitutional State Interference With Equal And Effective Access To The Courts*

1. States Exclude People With Disabilities From The Judicial Process As Litigants

States have historically denied persons with disabilities an equal opportunity to use the State courts as litigants by not providing interpreters or other necessities for effective communication, or by imposing architectural barriers that exclude persons with mobility or sensory impairments from using the court system. Such inaccessibility violates due process principles when people with disabilities are unable effectively to access the judicial system, either in the criminal or civil context. For criminal defendants, the due process clause guarantees that an "accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975). Parties in civil litigation have an analogous due process right to be present in the courtroom and to participate meaningfully in the process unless their exclusion furthers an important governmental interest. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) ("[t]he Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances"); *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971) (except in extraordinary circumstances, state must provide all civil litigants a meaningful opportunity to be heard).

Examples of exclusion from the judicial process in the civil arena are common. In *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.), cert. denied, 537 U.S. 812 (2002), for instance, a person who was partially deaf alleged that the State court failed to provide

him with adequate hearing assistance in his child custody case in violation of his equal protection and due process rights. The Sixth Circuit noted the fundamental nature of the rights at stake in parental custody hearings, and the procedural safeguards that this Court has repeatedly held are necessary in such hearings, including counsel for indigent defendants and free access to the trial records. *Id.* at 813–814 (citing *Lassiter* v. *Dep't of Social Servs.*, 452 U.S. 18, 30 (1981); *Santowsky* v. *Kramer*, 455 U.S. 745, 769–770 (1982); *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 128 (1996)). The court explained that "a state's failure to accommodate plaintiff's deafness may greatly increase the risk of error in the proceeding, precluding one side from responding to charges made by the opposing party, an essential element of our adversary system." *Id.* at 815. Concluding that the suit raised "obvious due process problems," the Sixth Circuit remanded the case for retrial on the unreasonable exclusion claim.[4] Because the Due Process Clause itself required the State to accommodate the parent's disability in the custody proceedings, Title II of the ADA plainly represents a congruent and proportional legislative response as applied in such circumstances. See *ibid.*

State criminal justice systems have also maintained barriers that effectively exclude persons with disabilities from participating meaningfully in judicial and related administrative proceedings, even when their own liberty is at stake. In *Armstrong* v. *Davis*, 275 F.3d 849 (9th Cir. 2001), cert. denied, 537 U.S. 812 (2002), for instance, a class of prisoners with disabilities alleged that California failed to provide them adequate access to, and a meaningful opportunity to participate in, their parole hearings. The process depended "to a great extent" on written forms; prisoners and parolees with disabilities were "provided with inade-

4. The court below applied *Popovich* when ruling on the cases now before this Court for review. See also, *e.g.*, *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir. 1998) (finding state courts physically inaccessible to quadriplegic civil litigant); *Duvall* v. *County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (finding material facts in dispute over whether county court proceedings were effectively inaccessible to hearing-impaired litigant).

quate accommodations to help them understand the content of those forms, and as a consequence some plaintiffs waived their rights to a hearing and others failed to invoke their rights on appeal." *Id.* at 857 (footnote omitted). The system did not provide American Sign Language interpretation services, Braille copies of documents, qualified readers, or staff capable of effectively communicating with prisoners and parolees with mental retardation or mental disabilities. *Id.* at 858 n.10. Affirming a lower court decision on ADA grounds, the Ninth Circuit held that the "minimal due process measures taken [by the defendant parole board] were insufficient to comply with the ADA or to enable plaintiffs properly to invoke or assert their rights." *Id.* at 862. Furthermore, there was no reasonable relation to any legitimate penological interest that could justify the impingement on the prisoners', and parolees', constitutional rights. *Id.* at 873–874.[5]

These kinds of problems, which prevent people with disabilities from effectively accessing the judicial system and vindicating their rights, are all too common. In 1997, for instance, the California Judicial Council concluded that many California courts conducted their proceedings in buildings that were not accessible to persons with disabilities, lacked proper communications equipment, provided too few interpreters, and otherwise denied equal access to persons with disabilities.[6]

5. See also *People* v. *Rivera*, 480 N.Y.S.2d 426 (Sup. Ct. 1984) (deprivation of due process where defendant with hearing impairment was sentenced as two time offender, and in earlier convictions, had been denied services of an interpreter); *Clarkson* v. *Coughlin*, 898 F. Supp. 1019, 1033 (S.D.N.Y. 1995) (failure to provide interpreters for inmates with hearing impairments for parole and disciplinary hearing violates due process).

6. *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* 8–12 (Jan. 1997), *at* http://www.courtinfo.ca.gov/reference/summarydisabilities.htm; see also N.Y. State Comm'n on Quality of Care for the Mentally Disabled, *Survey of Access to New York State Courts For Individuals With Disabilities* (June 1994) (only 8% of New York courts fully accessible to people with disabilities; "significant barriers" to access remain), *at* http://www.cqc.state.ny.us/publications/pubcourt.htm.

2. States Exclude People With Disabilities From The Judicial Process As Jurors

"Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others * * * than it may invidiously discriminate in the offering * * * of the elective franchise." *Carter* v. *Jury Comm'n*, 396 U.S. 320, 330 (1970). "The harm from discriminatory jury selection * * * touch[es] the entire community." *Batson* v. *Kentucky*, 476 U.S. 79, 87 (1986). There is no compelling interest in, nor any rational basis for, excluding people with physical and mental disabilities from jury service without regard to their individual ability to function effectively as jurors. Nonetheless, when Congress passed the ADA, it was relatively common for State courts categorically to refuse to allow people with certain disabilities to sit on juries. See, *e.g.*, *Hill* v. *Shelby County*, 599 F. Supp. 303, 304 (N.D. Ala. 1984) (noting that state courts "routinely excuse" from service "jurors who have severe physical disabilities").

For example, the State of New York barred persons with disabilities from jury service for more than 150 years, a practice which ended only upon the enactment of the ADA.[7] Until 1994, Arkansas barred people with "substantial impairments" to hearing or sight from participating as jurors. ARK. CODE ANN. § 16-31-102 (1987), amended, 1994 Ark. Acts No. 4, § 6 (1994);[8] see also *Eckstein* v. *Kirby*, 452 F. Supp. 1235, 1243 (E.D. Ark. 1978) (finding hearing- or vision-impaired jurors unfit to serve). The District of

7. *Lewinson* v. *Crews*, 282 N.Y.S.2d 83, 84–86 (App. Div. 1967) (excluding a blind college professor as a juror); *id.* at 87–88 (Hopkins, J., dissenting) (law in force since 1829), aff'd, 236 N.E.2d 853 (N.Y. 1968). New York courts continued to exclude all blind persons from jury service until the 1980s. *E.g.*, *Jones* v. *New York City Transit Auth.*, 483 N.Y.S.2d 623, 625–626 (Civ. Ct. 1984). Only upon the passage of the ADA did the New York state courts cease excluding disabled persons solely because of their status and without regard to their individual abilities. *People* v. *Guzman*, 555 N.E.2d 259, 261 (N.Y. 1990).

8. Copies of all non-current statutes cited in this brief are reproduced in the Appendix. The cited statutes are offered only as exemplars, and do not purport to represent *all* the discriminatory statutes in a particular area.

Columbia Superior Court continued to exclude all blind persons from jury service through 1993. *Galloway* v. *Superior Court*, 816 F. Supp. 12, 16–17 (D.D.C. 1993) (the "conclusion that blind jurors are not qualified appears based on exactly the archaic attitudes and unsubstantiated prejudices Congress wished to eradicate" with ADA). In *DeLong* v. *Brumbaugh*, 703 F. Supp. 399, 406 (W.D. Pa. 1989), a judge serving on Pennsylvania's superior court testified that "he would disqualify a deaf person under all circumstances." In 1985, the Missouri Supreme Court permitted the categorical exclusion of "deaf, mute, deaf-mute, and blind persons, from inclusion in the jury pool." *State* v. *Spivey*, 700 S.W.2d 812, 813–814 (Mo. 1985) ("We doubt that deaf persons have a community of attitudes or ideas."). Even today, a number of States have statutes that limit jury service to those who can "read," "write," or "speak" English, with no statutory exception for people who use American Sign Language or Braille—the same statutes that supported categorical exclusion of deaf and blind jurors in *Spivey* and *DeLong*. See, *e.g.*, ALA. CODE § 12-16-60 (1995); MD. CODE ANN., CTS. & JUD. PROC. § 8-207 (2002); N.J. STAT. ANN. § 2B:201 (2002); cf. also WYO. STAT. § 1-11-101 (2002) (jurors "in possession of * * * natural facilities").

B. Patterns Of Unconstitutional State Conduct Involving The Fundamental Right To Vote

When it passed the ADA, Congress found persistent discrimination in the "critical" area of "voting." See 42 U.S.C. § 12101(a)(3). The fundamental right to vote is "preservative of other basic civil and political rights." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). Classifications infringing the ability to exercise the right to vote must be examined under strict scrutiny. *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966).

1. States Disenfranchise People With Disabilities

States have historically prevented Americans with mental disabilities from exercising their fundamental right to vote through a host of laws, many of which are still on the books. Forty-two States currently have laws disenfranchis-

ing Americans with mental disabilities in a variety of contexts.[9] See *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 38 n.2 (D. Me. 2001). Similar and more egregious laws were on the books when Congress enacted the ADA. Indeed, the concurring opinion in *City of Cleburne* had described them just five years before. 473 U.S. at 464 (citing 1979 article finding that "most states still categorically disqualified 'idiots' from voting") (Marshall, J., concurring in part and dissenting in part).[10]

Such laws are unconstitutional when, facially or as applied, they categorically exclude people with disabilities from voting, without reference to individual competence.

9. See, *e.g.*, ALASKA CONST. art. V, § 2 (2000) (persons of unsound mind); ARK. CONST. art. 3, § 5 (1987); *id.* amend. 51 § 11(a)(6) (2001) (idiots or insane; adjudicated mentally incompetent); DEL. CONST. art. 5, § 2 (Supp. 2000); DEL. CODE ANN. tit. 15 § 1701 (1999) (idiot or insane); HAW. CONST. art. 2, § 2 (1997) (*non compos mentis*); IOWA CONST. art. 2, § 5 (2000) (idiot or insane); KAN. CONST. art. 5, § 2 (1988) (mental illness); KY. CONST. § 145(3) (2002); KY. REV. STAT. §§ 116.025(1) (1993), 387.590 (1984); MD. CONST. art. 1, § 4 (1981); MD. CODE ANN., ELEC. § 3-102(b)(2) (2002) (under care or guardianship for mental disability); MASS. ANN. LAWS CONST. AMEND. art. 3 (2002); MASS. ANN. LAWS ch. 51, § 1 (1991) (under guardianship); MISS. CONST. art. 12, § 241 (1999); MISS. CODE ANN. § 23-15-11 (1999) (idiots and insane); MONT. CONST. art. 4, § 2 (2001); MONT. CODE ANN. § 13-1-111(3) (1999) (adjudicated unsound mind unless finding reversed); NEB. CONST. art. 6, § 2 (2001); NEB. REV. STAT. ANN. § 32-313(1) (Michie 2000) (*non compos mentis*); NEV. CONST. art. 2, § 1 (1998) (idiot or insane); N.J. CONST. art. 2, § 6 (Supp. 1999); N.J. STAT. ANN. § 19:4-1(1) (2001) (idiot or insane); N.M. CONST. art. 7, § 1 (1992); N.M. STAT. ANN. § 1-1-4 (Michie 1995) (idiots or insane); OHIO CONST. art. 5, § 6 (1994) (idiots or insane); R.I. CONST. art. 2, § 1 (2002) (adjudicated *non compos mentis*); VT. CONST. ch. 2, § 42 (1996) (not quiet and peaceable). See Kay Schriner, et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 456 tbl. 2 (2000), for a chart describing these statutes. Many of the referenced statutory provisions continue to use what are now recognized as archaic, inexact, and pejorative terms, such as "lunatic" and "idiot," to describe the class of persons whose exercise of democratic rights are to be denied. Such imprecise categorization is itself suggestive of arbitrariness and discriminatory animus rather than legislative rationality, much less a compelling legislative interest or narrow tailoring.

10. When Congress enacted the ADA, the American Bar Association had opined that most of these statutes were unconstitutional. Schriner, *supra* note 9, at 451.

Such categorical exclusions serve no compelling State interest in protecting the integrity of the electoral process, much less provide the least restrictive means of doing so. Indeed, it is difficult to articulate how such laws meet even minimal standards of due process. One recent case overturning a fairly typical State disenfranchisement provision aptly illustrates the defects in such laws. In *Doe* v. *Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001), a Maine statute prohibiting individuals under guardianship for reason of "mental illness" from registering to vote or voting failed to pass constitutional muster on due process and equal protection grounds. The court applied strict scrutiny, and found that the State had "disenfranchised a subset of mentally ill citizens based on a stereotype rather than any actual relevant incapacity." *Id.* at 52. The court also found the statute facially unconstitutional under the equal protection clause, because the State's insistence on looking to archaic categories such as "idiotic," "lunatic," and "unsoundness of mind" to determine who was excluded from voting based on mental illness permitted improper classifications and disenfranchised an overbroad class of individuals. *Id.* at 54–55; see also, *e.g.*, *Manhattan State Citizens' Group Inc.* v. *Bass*, 524 F. Supp. 1270 (S.D.N.Y. 1981) (New York statute prohibiting individuals involuntarily committed to mental institution from voting was unconstitutional as applied).

2. States Deny Access To Voting Equipment and Polling Places

States have also discriminated by denying individuals with disabilities physical access to both polling places and voting machines. Although the cases in the area generally have been decided on statutory rather than constitutional grounds, it is hard to imagine a compelling State interest in making it difficult or impossible for people with disabilities to exercise their fundamental right to vote, particularly when necessary modifications often come at a minimal cost. For example, in *National Organization on Disability* v. *Tartaglione*, 2001 WL 1231717 (E.D. Pa. Oct. 11, 2001), a group of plaintiffs with visual and mobility impairments brought suit against, among others, the Secretary

of the Commonwealth of Pennsylvania, because the Secretary could, but had not, approved voting machines that would allow plaintiffs with visual impairments to participate fully in the voting process. See also *American Ass'n of People with Disabilities* v. *Smith*, 227 F. Supp. 2d 1276 (M.D. Fla. 2002) (declining to dismiss a suit against Florida officials where State officials certified machines which did not provide equal access to voters with disabilities); *Hill* v. *New York State Bd. of Elections*, 503 N.Y.S.2d 958 (Sup. Ct. 1986) (State board of elections had continually permitted local entities to locate polling places in sites inaccessible to people with disabilities). Because the States' categorical disenfranchisement of persons with disabilities and interference with such persons' rights to vote are themselves unconstitutional, there is no basis for concluding that the reasonable accommodation requirements of Title II do not represent a congruent and proportional legislative response in such circumstances.

C. Patterns Of State Interference With The Fundamental Right To Marry And Form Families

1. States Sterilize Persons With Disabilities

Every individual enjoys a fundamental right to control his or her ability to procreate "free from unwarranted governmental intrusion." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972). This Court has also recognized a fundamental right to bodily integrity under the Fourteenth Amendment's due process clause. *Cruzan* v. *Director, Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). Limitations on these fundamental rights are subject to heightened scrutiny. *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 684–686 (1977).

The States share a long and shameful pattern of depriving Americans with disabilities of the right and ability to procreate. Early in the last century, most States had laws authorizing involuntary sterilization of persons with disabilities.[11] Some of those laws were still in force when Con-

11. See generally Phillip R. Reilly, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 45–55 (1991).

gress enacted the ADA, although commentators generally had long concluded that "compulsory sterilization laws, no matter what their rationale, [we]re unconstitutional in the absence of evidence that compulsory sterilization [wa]s the only remedy available to further a compelling governmental interest."[12] In 1991, for instance, an Arkansas court overturned, as violative of due process, a State statute authorizing sterilization of "mentally deficient persons" without provision for notice, right of representation, right of hearing, or judicial oversight of the sterilization decision. *McKinney* v. *McKinney*, 805 S.W.2d 66 (Ark. 1991); see also *Motes* v. *Hall County Dep't of Family & Children Servs.*, 306 S.E.2d 260, 261–262 (Ga. 1983) (Georgia statute authorizing sterilization on "legal preponderance" of evidence did not meet constitutional requirements, because due process requires "'clear and convincing' evidence").[13] In 1981, former patients of Virginia institutions who were involuntarily sterilized under a 1924 statute articulated a continuing constitutional violation, based on the State's continuing failure to *notify* them that they had been involuntarily sterilized—causing them to suffer "medical, emotional, and mental problems, arising in large part from unsuccessful and uninformed attempts to deal with their infertility." *Poe* v. *Lynchburg Training Sch. & Hosp.*, 518 F. Supp. 789, 793 (W.D. Va. 1981).

Even after compulsory sterilization statutes were repealed, some States enacted statutes that allowed sterilization on the consent of the superintendent of a custodial care institution or a guardian.[14] Sterilization on the ba-

12. See *In re A.W.*, 637 P.2d 366, 368–369 (Colo. 1981) (citing Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995 (1977), and others).

13. Moreover, in the decades immediately before the ADA, State courts still were upholding sterilization statutes, citing the infamous decision in *Buck* v. *Bell*, 274 U.S. 200 (1927). See, *e.g.*, *In re Sterilization of Moore*, 221 S.E.2d 307 (N.C. 1976); *Cook* v. *State*, 495 P.2d 768 (Or. 1972).

14. Price & Burt, *Sterilization, State Action and the Concept of Consent*, 1 LAW & PSYCH. REV. 57 (1978). *E.g.*, MISS. CODE ANN. §§ 41-45-1, 41-45-9 (1999) (sterilization of "insane, idiotic, imbecile or feeble-

sis of the legal fiction of "substituted consent" still involves State action threatening the fundamental right of procreation. Relying on substituted consent, courts have permitted third persons to consent to sterilizations in circumstances in which the facts indicate that no compelling interest was at stake. See, *e.g.*, *Stump* v. *Sparkman*, 435 U.S. 349 (1978) (15-year-old girl with mild retardation sterilized involuntarily after judge approved, *ex parte*, her mother's petition, without notice to the daughter or appointment of a guardian *ad litem*, although the daughter attended public school and had been promoted each year with her class); *Downs* v. *Sawtelle*, 574 F.2d 1, 5 (1st Cir. 1978) (21-year-old woman who was deaf and mute sterilized with consent of her guardian based on doctor's report recommending the operation "'based 90% on this girl's low mentality involving poor judgment and her lack of restraint on sex appetite and its consequences'") (citation omitted).[15] Because such unconsented-to State-approved sterilization is itself a violation of the constitutional rights of the sterilized individual, there is no support for the contention that Title II of the ADA fails the requirements of congruence and proportionality in this context.

2. States Prohibit The Marriage Of People With Disabilities

Marriage is one of the "basic civil rights of man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), so the right to marry has long been considered fundamental, *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). State laws restricting the

minded" person who "by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted," upon petition of director of State institution after hearing); IND. CODE § 22-1601 (1950).

15. See also, *e.g.*, *In re A.W.*, 637 P.2d at 370 ("[c]onsent by parents to the sterilization of their mentally retarded offspring has a history of abuse which indicates that parents, at least in this limited context, cannot be presumed to have an identity of interest with their children. The inconvenience of caring for the incompetent child coupled with fears of sexual promiscuity or exploitation may lead parents to seek a solution which infringes their offspring's fundamental procreative rights.") (footnotes omitted).

right of a class of persons to marry are unconstitutional unless the State can show a compelling interest. *Zablocki* v. *Redhail*, 434 U.S. 374, 381 (1978).

Nevertheless, numerous State statutes historically and categorically restricted the right of persons with disabilities to marry, without a determination of individual capacity, in a manner that cannot withstand strict scrutiny. Many States maintained such restrictive statutes through the enactment of the ADA.[16] Just five years before Congress enacted Title II, for instance, this Court noted in *City of Cleburne* that it was still a criminal offense in several states for people with mental retardation to marry. 473 U.S. at 463 & n.12.

Some statutes discriminating against the right of persons with disabilities to marry are still on the books. TENN. CODE ANN. § 36-3-109 (2001), for instance, forbids the issuance of a marriage license "when it appears that the applicants or either of them is at the time drunk, insane or an imbecile." See also MISS. CODE ANN. § 93-1-5 (1999) (same); D.C. CODE ANN. § 46-403 (2001) (marriage of "an idiot or of a person adjudged to be a lunatic" is illegal and void). In 1987, Utah declared that marriage with "a person afflicted with acquired immune deficiency syndrome" is "prohibited" and "void." UTAH CODE ANN. § 30-1-2(1) (1987) (declared "void and invalid" on statutory grounds in *T.E.P.* v. *Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993)). Such statutes provide States with the authority to deny marriage licenses to people on the basis of disabilities with-

16. CAL. CIV. CODE § 4201 (1987) ("imbecile"; "insane"); D.C. CODE ANN. § 30-103 (1981) ("idiot"; "lunatic"); IOWA CODE ANN. § 595.3 (1990) ("a mental retardate"; "mentally ill"); MICH. COMP. LAWS § 551.6 (1988) ("feebleminded"; "imbecile"; "insane"); MISS. CODE ANN. § 41-21-45 (1990) (unlawful to cohabit with "feebleminded" female); PA. STAT. ANN. tit. 48, § 1-5 (West 1990) ("weak-minded"; "insane"); R.I. GEN. LAWS § 15-1-5 (1988) ("idiot"; "lunatic"); VT. STAT. ANN. tit. 15, § 514 (1989) ("idiot"; "lunatic"); *id.* tit. 15, § 512 (1989) ("physically incapable"); W. VA. CODE § 48-2-2 (1990) ("insane"; "idiot"; "imbecile") (copies included in Appendix). See Bruce Dennis Sales, et al., DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 16–20 (Plenum Press 1982) (as of 1980, forty-two States and the District of Columbia had statutes restricting marriage for persons with disabilities).

out any compelling interest or, indeed, any rational basis. Such denials are themselves unconstitutional, and for that reason, the reasonable accommodation requirement of the ADA must be viewed as a congruent and proportional legislative response in such and similar circumstances.

3. States Discriminate Against Parents With Disabilities

The right to raise one's children is protected by the Constitution. *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972). Balanced against this right is the state's interest in the welfare of the child. *Wisconsin* v. *Yoder*, 406 U.S. 205, 233–234 (1972). The Court has repeatedly "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000).

Yet, in matters involving the parent-child relationship, States historically have treated parents with mental retardation and mental or physical disabilities quite differently from other parents. "[D]iscrimination begins with the initial decision to intervene, ends in the decision to terminate the relationship, and is manifest in nearly every significant decision along the way."[17] That discrimination often relies on stereotypes, rather than real individual differences in capacities.

Such stereotyping is evident, for example, in State custody determinations involving parents with mental or physical disabilities, even in cases citing the "best interest of the child" standard. In *Bednarski* v. *Bednarski*, 366 N.W.2d 69, 73 (Mich. Ct. App. 1985), a Michigan trial court terminated a deaf woman's custody of her "[t]wo normal children," citing her deafness, forcing the appellate court to reverse. In another example, a trial judge ordered that a blind father—a successful CEO of a computer company—must be accompanied at all times by a "responsible adult" while caring for his daughter, simply because of his disability. *Clark* v. *Madden*, 725 N.E.2d 100, 103 (Ind. Ct. App. 2000) (reversing trial court). In *H.J.B.* v. *P.W.*, 628 So. 2d 753, 756 (Ala. Civ. App. 1993), an Alabama court affirmed a father's loss of custody primarily because he was HIV-positive.[18]

17. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1227 (1990).

State agencies have also classified children with disabilities as "unadoptable" in violation of their constitutional rights. In *Baby Neal* v. *Casey*, 821 F. Supp. 320 (E.D. Pa. 1993), for instance, the court permitted due process claims to proceed on behalf of two children classified as "unadoptable" by the Philadelphia Department of Human Services, one because he was tested positive for AIDS, the other because he was "handicapped." Again, because the underlying State conduct at issue in each of these cases was itself unconstitutional, there is no plausible basis for concluding that Title II fails to serve as a congruent and proportional legislative response.

D. Patterns Of Unconstitutional State Discrimination In Education

"[E]ducation is perhaps the most important function of state and local governments." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). In view of the importance of the issue, the categorical exclusion of any class of children from the educational system would pose serious equal protection concerns. See *San Antonio Indep. Sch. Dist.* v. *Rodriguez*,

18. See also *In re Interest of T.N.V.*, 855 S.W.2d 102, 103 (Tex. App.—Corpus Christi 1993) (describing trial court's decision to allow HIV-positive father visitation with his daughter only if both father and child remained "fully robed and fully clothed with gloves, sterile gown and face masks" and ordering that "[t]here shall be no 'skin to skin' contact at any time during the visit"); *In re Marriage of R.R.*, 575 S.W.2d 766, 768 (Mo. Ct. App. 1978) (reversing order of trial judge awarding custody to "immoral" and "dishonest" mother because of unsubstantiated fear that the children would be "emotionally damaged because of [the father's] handicap," multiple sclerosis); *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (condemning trial court's conclusion that father was "deemed forever unable to be a good parent simply because he is physically handicapped" because "[l]ike most stereotypes, this is both false and demeaning"); *Adoption of Richardson*, 59 Cal. Rptr. 323, 329–330 (Ct. App. 1967) (reversing trial court refusal to permit a deaf couple to adopt a child; "[t]here can be no doubt that the judge was biased and prejudiced" against the parents "solely because they were deaf-mutes."); *Moye* v. *Moye*, 627 P.2d 799 (Idaho 1981) (epilepsy).

411 U.S. 1, 37 (1973) (distinguishing "absolute denial" of education from inequalities in funding). States nevertheless have historically discriminated against people with disabilities by excluding them from educational opportunities, and this pattern continues to the present day.

Earlier in the last century, a number of States categorically excluded children with disabilities from public education. See, *e.g.*, DEL. CONST. art. 10, § 1 (1975) (establishing free public schools for all children *except* those who were "physically or mentally disabled"). When Congress enacted the Education for All Handicapped Children Act ("EAHCA") in 1975, it compiled an extensive record that States simply did not educate children with disabilities. Based on this record, Congress found that one million children were *"excluded entirely"* from the public school system, and "more than one-half" of the 8 million children with disabilities did not receive appropriate educational services. 20 U.S.C. § 1400(c)(2) (emphasis added).

Judicial decisions confirm Congress' conclusion. In *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), for instance, students with mental retardation charged that Pennsylvania statutes excluded them from schools. The court found that the plaintiffs had articulated equal protection and due process claims under the rational basis test. See also *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (due process violation when defendant excluded students with disabilities from public education). Congress considered these cases and others like them when it enacted the EAHCA. See *Honig* v. *Doe*, 484 U.S. 305, 310 (1988) ("by the time of the EHA's enactment, parents had brought legal challenges to similar exclusionary practices in 27 other States"). Even when unconstitutional statutory schemes were remedied, States continued to violate the equal protection clause by excluding students with disabilities from educational opportunities. See, *e.g.*, *Panitch* v. *Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977).

These constitutional violations continued when Congress enacted the ADA, fifteen years later. In fact, Congress relied upon a Civil Rights Commission Report finding that,

notwithstanding the EAHCA, "a great many handicapped children continue to be excluded from the public schools."[19] Congress found, therefore, that States still were discriminating against children with disabilities in the "critical area" of "education." 42 U.S.C. § 12101(a)(3). Unfortunately, instances of unconstitutional State exclusion persist even today. See, *e.g.*, *Robinson* v. *Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000) (students with disabilities stated actionable due process and equal protection claims alleging inadequate school funding), aff'd, 295 F.3d 1183 (10th Cir. 2002), cert. denied, 123 S. Ct. 2574 (2003).

E. Patterns Of Unconstitutional State Treatment Of People With Disabilities In Institutions

In enacting the ADA, Congress found continuing State-sponsored discrimination in the "critical" area of "institutionalization," and noted as well pervasive discrimination against people with disabilities through "segregation." See 42 U.S.C. § 12101(a)(3), (5). The record before Congress when it passed Title II was replete with examples of unconstitutional State-sponsored discrimination in both civil and penal institutions. Such discrimination continues today.

1. States Institutionalize People With Disabilities Without Necessity And Treat Them Deplorably While They Are In Civil Institutions

Just eight years before Congress enacted the ADA, this Court decided *Youngberg* v. *Romeo*, 457 U.S. 307, 315–319 (1982), confirming that people in civil institutions are constitutionally entitled to safe conditions, freedom from unnecessary bodily restraints, and the training necessary to assist them in securing those rights. Nonetheless, the States when the ADA was enacted and today have proven resistant to improving the deplorable unconstitutional conditions in some civil institutions.

A case brought by a class of children with mental re-

19. United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 29 (1983) (*"Accommodating the Spectrum"*).

tardation, emotional disturbances, and physical disabilities against the State of Louisiana is a prime example of a State's continuing unconstitutional behavior. In 1976, the plaintiffs established unnecessary physical abuse, neglect, and unnecessary restraint of its wards, and the judge ordered remedial action. *Gary W.* v. *Louisiana*, 437 F. Supp. 1209, 1219, 1213 (E.D. La. 1976). In 1990, *twenty-five years later*, and notwithstanding the judge's efforts "to facilitate, cajole, and even coerce compliance," the State institutions still were unable to prevent outright abuse of patients, or to provide minimally adequate treatment, consistent with constitutional standards. *Gary W.* v. *Louisiana*, 1990 U.S. Dist. LEXIS 1746, at *81 (E.D. La. Feb. 15, 1990).[20]

Other egregious examples abound. A federal judge recently described Alabama's institutions as "essentially warehousing patients in an inhumane environment." *Wyatt ex rel. Rawlins* v. *Rogers*, 985 F. Supp. 1356, 1361–1362 (M.D. Ala. 1997). The same institutions were the subjects of similar findings, of unconstitutional conduct as early as 1971 for "grossly substandard" instances including examples of residents being scalded to death and restrained in a straitjacket for nine years, among others. *Wyatt* v. *Stickney*, 344 F. Supp. 387, 391 (M.D. Ala. 1972), aff'd in relevant part, 503 F.2d 1305 (5th Cir. 1974). The year that Congress passed Title II, the staff at a New York facility for people with mental retardation regularly left the children in their care lying half-naked and unattended in their own urine

20. Just four years ago, the General Accounting Office documented the continuing practice of unnecessary physical restraint among State institutions. GAO, *Mental Health: Improper Restraint or Seclusion Use Places People at Risk* (Sept. 1999), *at* http://www.gao.gov/archive/1999/he99176.pdf. The Department of Justice likewise has settled, with consent orders, several recent egregious cases involving unnecessary physical restraints. See, *e.g.*, Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, DOJ, to The Honorable Thomas J. Vilsack, Governor of Iowa (July 9, 2002), *at* http://www.usdoj.gov/crt/split/documents/ia_findings_wsrc_gsrc.htm (residents in Iowa institution spent an average of 18 hours a month in mechanical restraints, some for as long as 300 hours a month, and many residents were injured by the use of such restraints). Many similar samples are available at http://www.usdoj.gov/crt/split/findsettle.htm.

and feces on cold floors while the staff watched television. *Society for Good Will to Retarded Children* v. *Cuomo*, 745 F. Supp. 879, 879 (E.D.N.Y. 1990).[21]

In addition to treating people with disabilities deplorably while they are in institutions, the States have a long history of institutionalizing people unnecessarily. The Constitution protects individuals from unnecessary confinement in institutions. *O'Connor* v. *Donaldson*, 422 U.S. 563, 574–575 (1975) (if the basis for commitment ceases to exist, continued confinement unconstitutionally deprives the individual of a significant liberty interest).

Historically, the States institutionalized individuals with mental retardation or deafness as a matter of course, based on false stereotypes, the "science" of eugenics, and pure xenophobia. *City of Cleburne*, 473 U.S. at 461–462 (describing a pattern of State-mandated institutionalization that "paralleled the worst excesses of Jim Crow") (Marshall, J., concurring in part and dissenting in part). Although the laws that mandated institutionalization have largely been repealed, there still is ample evidence of unnecessary and unconstitutional civil commitment. Congress was aware of such evidence when it passed the ADA,[22] and the judicial record amply confirms that it exists. For example, in *Clark* v. *Cohen*, 794 F.2d 79, 85–86 (3d

21. See also, *e.g.*, *Halderman* v. *Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1306–1309 (E.D. Pa. 1977) (unconstitutional, deplorable, and hazardous conditions, including widespread inappropriate use of restraints and incidents of direct abuse from staff persons; the walls of the institution were covered in feces and urine and the residents were subject to outbreaks of infectious disease), rev'd on other grounds, 451 U.S. 1 (1980); *Association for Retarded Citizens* v. *Olson*, 561 F. Supp. 473, 476 (D.N.D. 1982) (constitutional violations in North Dakota institutions; drugs were administered casually, often to the wrong individual; residents were regularly left naked in front of other residents; individuals' health worsened rather than improved), aff'd in relevant part, 713 F.2d 1384 (8th Cir. 1983); *Lelsz* v. *Kavanagh*, 673 F. Supp. 828, 844–848 (N.D. Tex. 1987) (systemic understaffing and communications failures led to inappropriate medication and deaths; behavior modification techniques were "state of the art 1950's") (internal quotations omitted).

22. See *Accommodating the Spectrum*, *supra* note 19, at 34 (noting that "segregationist purpose" of institutions continued; institutions still "lack rational admitting criteria," among other defects).

Cir. 1986), the Third Circuit documented a ten-year effort by staff at a Pennsylvania institution to secure the release of a woman with mild retardation. At age fifteen, in 1956, she was labeled as "severely defective" and committed without a hearing. *Id.* at 85. Even after the statute under which she was committed was repealed, and despite her doctors' recommendations that she be released, State officials never reviewed her case. *Ibid.* In the end, Pennsylvania did not dispute that *forty years* of unnecessary institutionalization had deprived the plaintiff of any hope of living the rest of her life without supervised care. *Id.* at 83. The court of appeals found that this conduct violated the plaintiff's substantive due process rights. *Id.* at 87. In *Eric L. ex rel. Schierberl* v. *Bird*, 848 F. Supp. 303 (D.N.H. 1994), the court found that the State violated procedural due process, equal protection, and the ADA when it segregated children with disabilities in institutions which isolated them and denied them services and placement opportunities comparable to those available to children without disabilities.[23]

2. States Ignore The Medical Needs Of Prisoners With Disabilities And Otherwise Violate Their Constitutional Rights

The Eighth Amendment prohibits disproportionate punishments, *Weems* v. *United States*, 217 U.S. 349, 366–367

23. See also *Thomas S.* v. *Morrow*, 781 F.2d 367, 369–373 (4th Cir. 1986) (North Carolina violated constitutional rights of man with mild retardation when it moved him from State hospital to a detox center rather than providing non-residential support services as hospital recommended); *Jackson* v. *Ft. Stanton Hosp. & Training Sch.*, 757 F. Supp. 1243, 1294–1296 (D.N.M. 1990) (New Mexico deprived a class of individuals with developmental disabilities who were unnecessarily committed of substantive due process rights in numerous instances), rev'd in part on other grounds, 964 F.2d 980 (10th Cir. 1992); D. Schein, *At Home Among Strangers* (1989) (describing numerous deaf individuals committed under repealed statutes allowing for commitment solely by reason of deafness or erroneously considered to have mental disabilities; continued commitment had not been reviewed). Unfortunately, the problem of unnecessary institutionalization remains pervasive. See Sharon P. Davis, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997), *at* http://www.thearc.org/misc/WaitPage.html.

(1910), and the "unnecessary and wanton infliction of pain," *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). The Constitution also forbids State prisons to act with deliberate indifference to the medical needs of prisoners with disabilities. *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976).[24] This practice subjects prisoners with disabilities to multiple punishments: in addition to their sentence, they suffer unnecessary pain, loss of dignity, and, in some cases, a shortened lifespan.

At the time Title II was enacted, however, State prisons nevertheless continued to abuse prisoners with disabilities, denying them these fundamental constitutional protections. For example, a Michigan prison routinely forced two paraplegic inmates to sit in their own feces for hours at a time, causing them medical complications. *Parrish* v. *Johnson*, 800 F.2d 600, 602–603 (6th Cir. 1986). Staff habitually refused to relay the prisoners' requests for aid to nurses, and deliberately placed their food trays in inaccessible positions. Moreover, prison officials did nothing to stop a guard who on several occasions assaulted the inmates with a knife and frequently called one inmate a "crippled bastard who should be dead." *Id.* at 603. The State's conduct furthered "[n]o legitimate penological or institutional objective." *Id.* at 605.

In *Kiman* v. *New Hampshire Department of Corrections*, 301 F.3d 13, 25 n.9 (1st Cir. 2002), aff'd, 332 F.3d 29 (1st Cir. 2003) (en banc), for instance, an inmate with Lou Gehrig's Disease sued New Hampshire under the ADA and State laws. 301 F.3d at 14–15. During his confinement, Mr. Kiman gradually lost the ability to control his voluntary muscles. *Id.* at 15. Despite his repeated requests, the State refused to provide him with a cane to walk or a chair to use in the shower; cuffed his hands behind his back rather than in front despite his pleas of pain; refused to move his cell from the third tier despite his inability to climb stairs; and refused to provide him a special toilet, requiring him to rely on the goodwill of his cellmates to engage in personal hy-

24. *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 210 (1998), confirmed that prisoners with disabilities can sue State prisons under Title II for discrimination in the provision of medical services.

giene. *Id.* at 16. The First Circuit held that the complaint fairly could be read to allege a violation of both the Eighth Amendment and equal protection. *Id.* at 24 & 25 n.9. Because the State's refusal to accommodate Mr. Kiman's disability was itself a constitutional violation, the ADA represents a congruent and proportional response as applied to the type of violations alleged in that case. See *id.* at 25 & n.9.

The suffering endured by inmates with disabilities is reaching crisis proportions. Prisoners with disabilities are over-represented in the criminal justice system and are swelling the ranks of penal institutions.[25] A recent class action in California illustrated State-wide systemic and unconstitutional abuse of prisoners with mental disabilities. In *Coleman* v. *Wilson*, 912 F. Supp. 1282, 1305–1323 (E.D. Cal. 1995), the record revealed that California failed to: screen inmates for medical needs; maintain basic medical records and medication policies; maintain adequate and competent staffing; appropriately use mechanical restraints; and prevent inappropriate disciplinary and behavior control measures on prisoners with mental disabilities, including use of isolation and taser guns. *Ibid.* Each one of these practices violated the prisoners' constitutional rights. *Id.* at 1305–1325.[26]

25. See Council of State Governments, *Criminal Justice/Mental Health Consensus Project* (June 2002), *at* http://consensusproject.org; Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* ch. III (Oct. 2003), *at* http://www.hrw.org/reports/2003/usa1003/. Once incarcerated, inmates with disabilities are far more likely to be victimized, exploited, and injured than other inmates. See, *e.g.*, *Ruiz* v. *Estelle*, 503 F. Supp. 1265, 1344 (S.D. Tex. 1980), aff'd in relevant part, 679 F.2d 1115 (5th Cir. 1982).

26. See also, *e.g.*, *Ruiz*, 503 F. Supp. at 1274–1391 (126-page opinion describing Texas' unconstitutional treatment of prisoners with disabilities, including among many other examples routinely denying prescribed treatments for prisoners who use asthmatic inhalers and wheelchairs and disciplining prisoners with mental retardation for infractions of rules they did not understand); *Yarbaugh* v. *Roach*, 736 F. Supp. 318, 320 (D.D.C. 1990) (prisoner with multiple sclerosis was incarcerated for over a year before he was seen by a physician and did not receive assistance in daily activities; as a consequence, he had not showered in over a year and had fallen repeatedly attempting to move from his wheelchair to his bed).

F. Patterns Of Irrational State Segregation Of People With Disabilities From The Community

Even outside the walls of State-run institutions, the States have historically segregated Americans with disabilities from the community at large through discriminatory zoning laws. Such laws lack a rational basis when they treat people with disabilities differently than other groups without justification. *City of Cleburne*, 473 U.S. at 450 (ordinance requiring a group home for people with mental retardation to obtain a special use permit but not requiring other groups to obtain similar permits violated equal protection).

Over the past decades, many individuals with disabilities have moved from institutional settings into more integrated community settings. Unfortunately, States and municipalities reacting to pressure based on stigma and prejudice responded by enacting dispersion laws that prevent the concentration of community residences for individuals with disabilities in one area. *Epicenter, Inc.* v. *City of Steubenville*, 924 F. Supp. 845, 849 (S.D. Ohio 1996) (cities "reacted to the deinstitutionalization movement" like "post-bellum Southern state governments that passed Jim Crow laws").

When Congress enacted Title II, this form of discrimination was extensive, and involved State as well as local/municipal action. In *Larkin* v. *Michigan*, 883 F. Supp. 172 (E.D. Mich. 1994), for instance, the court considered a Michigan law forbidding the licensing of a group home for people with disabilities if the group home was to be located within 1500 feet of another group home. *Id.* Finding that the dispersion requirements placed quotas on the people with disabilities who could live in a residential neighborhood, the court struck the law as without rational basis and thus violative of equal protection guarantees. *Id.* at 179–180;[27] see also *Bangerter* v. *Orem City Corp.*, 46 F.3d 1491,

27. The Sixth Circuit affirmed on statutory grounds without reaching the constitutional issue. 89 F.3d 285 (6th Cir. 1996). Other States have similar dispersion requirements. See, *e.g.*, CONN. GEN. STAT. § 8-3f

1503 n.20 (10th Cir. 1995) (statutory claim involving Utah law mandating that community housing for people with "handicap[s]" provide 24-hour supervision; "if this case had been brought as an equal protection claim, there is no evidence that the zoning restrictions were rationally related to legitimate government concerns and not based on unsubstantiated fears or irrational prejudices"); *Association of Relatives and Friends of AIDS Patients* v. *Regulations and Permits Admin.*, 740 F. Supp. 95, 103–106 (D.P.R. 1990) (finding intentional discrimination against people with AIDS in zoning decision).

CONCLUSION

Congress' specific findings, the materials cited in this brief, and the legislative history detailed in other briefs all provide extensive and compelling evidence that States perpetuated a pattern of unconstitutional discrimination. In view of this long-standing pattern, Congress was acting well within its constitutional authority when it abrogated the States' immunity from suit under Title II. Accordingly, this Court should affirm the judgments below.

Respectfully submitted.

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(2001); DEL. CODE ANN. tit. 22, § 309 (2002); VT. STAT. ANN. tit. 24, § 4409(f) (2002).

APPENDIX

THE AMICI ORGANIZATIONS

AARP is a nonpartisan, nonprofit membership organization with more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Countless AARP members with disabilities rely on Title II of the ADA to assure access to public programs and services, including those provided by States and State entities, in a manner free from discrimination. These protections are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professional and other persons who work exclusively in the field of mental retardation. AAMR promotes progressive policies, sound research, effective practices, and human rights for people with intellectual disabilities.

The American Council of the Blind ("ACB") is a national nonprofit, consumer organization of the blind, with seventy affiliates and members in all fifty states. Its mission is to improve the quality of life, equality of opportunity, and independence for all persons who are blind. To that end, ACB seeks to educate policy makers about the needs and capabilities of people who are blind, and to assist individuals and organizations wishing to advocate for programs and policies that meet the needs of people who are blind, or visually impaired. ACB members were very involved in the efforts that led to the passage of the ADA. Therefore, we are very disturbed about the legal challenges to its constitutionality which have been raised in recent years. We are especially concerned that state governments are increasingly taking up the cause of those who would weaken the ADA's effectiveness. We urge this Court to give careful consideration to the implications of such challenges for the rights and welfare of people with disabilities who live and work within those states.

The American Diabetes Association is the nation's leading nonprofit health organization providing diabetes

research, information, and advocacy. Founded in 1940, the Association conducts programs in all 50 states and the District of Columbia, providing services to hundreds of communities across the country. The mission of the organization is to prevent and cure diabetes, and to improve the lives of all people affected by diabetes. To fulfill this mission, the Association funds research, publishes scientific findings, provides information and other services to people with diabetes, their families, health care professionals and the public, and advocates for scientific research and for the rights of people with diabetes.

The American Occupational Therapy Association ("AOTA") is the national professional association of over 40,000 occupational therapists and occupational therapy assistants as well as students of the profession. The AOTA mission is to support the contributions of occupational therapy to health, wellbeing, productivity and quality of life. Occupational therapists provide treatment and intervention for people with physical and mental disabilities to promote full participation in society and maximum achievement of human potential. Occupational therapy can assist individuals with disabilities in identifying work limitations and potential. AOTA advocates on behalf of the profession and the public through support of positive public policy such as that contained in the Americans with Disabilities Act.

The American Psychiatric Association, with approximately 40,000 members, is the Nation's largest organization of physicians specializing in psychiatry. It has participated in numerous cases in this Court, including *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581 (1999). Its members have a strong interest in the constitutionality of the Americans with Disabilities Act as it bars government entities' discrimination against persons with disabilities, including persons with mental illnesses or disabilities.

The Arc of the United States ("The Arc"), through its nearly 900 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and related disabilities and

their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, which have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act.

The Association on Higher Education And Disability ("AHEAD") is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities, including professional licensing and employment. Its membership includes approximately 2,000 institutions including colleges, universities, not-for-profit service providers, and standardized testing organizations, professionals, and college and graduate students planning to enter the field of disability practice. Many of its members are actively engaged in assuring ADA compliance and in providing reasonable accommodations to both students and employees at institutions of higher education and in high-stakes standardized testing. In addition, AHEAD members actively work with students in establishing vocational plans and job readiness. AHEAD publishes numerous resources on the implementation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 by post-secondary educational institutions.

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the ADA.

The Alexander Graham Bell Association for the Deaf and Hard of Hearing ("AG Bell") is a non-profit organization with chapters throughout the United States, and has international affiliates throughout the world. AG Bell advocates for spoken language in children and adults. AG Bell is deemed to be the preeminent organization in deafness. AG Bell provides advocacy, resources and leadership

for parents, professionals, and individuals who are deaf or hard of hearing.

The Depression and Bipolar Support Alliance ("DBSA") is the leading patient-directed national organization focusing on the most prevalent mental illnesses—depression and bipolar disorder. Studies indicate that there may be 20 to 35 million persons with depression and 2.5 million to 10 million people with bipolar disorder. DBSA was founded in 1985 and is based in Chicago. DBSA's mission is to improve the lives of people living with mood disorders. This not-for-profit organization fosters an environment of understanding about the impact and management of these life threatening illnesses by providing up-to-date, scientifically based tools and information, written in easy to understand language. DBSA has more than 1,000 peer-run support groups across the country. Assisted by a Scientific Advisory Board, comprised of the leading researchers and clinicians in the field of mood disorders, DBSA supports research to promote more timely diagnosis, to develop more effective and tolerable treatments and to discover a cure. The DBSA organization works to ensure that people living with mood disorders are treated equitably. In that regard, we believe that the Americans With Disabilities Act should be given a strong and vigorous construction, including coverage for the unlawful discriminatory acts of State units of government.

Easter Seals has been providing services that help individuals with disabilities and special needs, and their families, live better lives for more than 80 years. Easter Seals promotes the passage and enforcement of federal legislation, including the ADA, that enables people with disabilities to achieve greater independence. Our primary services—medical rehabilitation, job training and employment, inclusive child care, adult day services, and camping and recreation—benefit more than 1 million individuals and their families each year through one of 450 centers nationwide.

The Epilepsy Foundation® is the sole national, charitable voluntary health organization dedicated to advancing the interests of the more than two million people with

epilepsy and seizure disorders. The term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, including the delivery of public services and participation in public programs. Since its inception, the Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws, such as the ADA, that protect individuals from discrimination based on these stereotypes and fears.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national non-profit public interest organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered and people with HIV or AIDS through impact litigation, education and public policy work. Founded in 1973, Lambda Legal is the oldest and largest legal organization addressing these concerns. Since 1983, when it filed the nation's first AIDS discrimination case, Lambda Legal has appeared as counsel or *amicus curiae* in scores of cases in state and federal courts on behalf of people living with HIV or with other disabilities.

As The Nation's Voice on Mental Illness, the National Alliance for the Mentally Ill ("NAMI") leads a national grassroots effort to transform America's mental health care system, eliminate stigma, support research, and attain adequate health insurance, housing, rehabilitation, jobs and family support for millions of Americans living with mental illnesses. Since its creation in 1979, NAMI's members have worked tirelessly at national, state and local levels to combat pervasive discrimination against people with mental illnesses that impose barriers to recovery and prevent these individuals from enjoying fundamental rights accorded other Americans.

The National Association for Rights Protection and Advocacy ("NARPA") includes recipients of mental health and developmental disabilities services; lay, professional, and self-advocates; family members; service providers; disability rights attorneys; and teachers at schools of law, social work, and public policy. It is dedicated to promoting the preferred options of people who have been labeled mentally

disabled.

The National Association of Councils on Developmental Disabilities ("NACDD") is a national organization for Developmental Disabilities Councils that advocates and works for change on behalf of people with developmental, as well as other disabilities, and their families. NACDD was established in 2003 to bring together the two organizations that supported Developmental Disabilities ("DD") Councils, CDDC and NADDC. NADDC was established by DD Councils in 1974 to support them in carrying out their mandated responsibilities under the Developmental Disabilities Assistance & Bill of Rights Act, and to be their national voice. Members are nationwide State and Territorial DD Councils. State Councils undertake advocacy, capacity building, and systemic change activities that are consistent with the purpose of the DD Act, that contribute to a coordinated, consumer and family-centered, consumer and family-directed, comprehensive system of community services, individualized supports and other forms of assistance that enable individuals with developmental disabilities to exercise self-determination, be independent, be productive and be integrated and included in all facets of community life.

The National Council on Independent Living ("NCIL") is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, statewide independent living councils, people with disabilities and other disability rights organizations. NCIL's mission is to advance the independent living philosophy and to advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society.

For over thirty years, the National Health Law Program ("NheLP") has engaged in legal and policy analysis on behalf of low income and working poor people, people with disabilities, the elderly, and children. NheLP has provided legal representation and conducted research and policy analysis on issues affecting the health status and health access of these groups. As such, NheLP has worked with

the ADA, and the program's work and our clients will be significantly affected by the Court's decision in this case.

Established in 1909, the National Mental Health Association, with its more than 340 affiliates, is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, re-search, and services. NMHA envisions a just, humane and healthy society in which all people are accorded respect, dignity, and the opportunity to achieve their full potential free from stigma and prejudice.

The National Mental Health Consumers' Self-Help Clearinghouse is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The National Multiple Sclerosis Society is dedicated to ending the devastating effects of multiple sclerosis. The National MS Society is the only national voluntary MS organization that meets the standards of all major agencies that rate nonprofit groups. The Society supports more MS research and serves more people with MS than any national voluntary MS organization in the world. Through its 50-state network of chapters, the Society funds research, furthers education, advocates for people with disabilities, and provides a variety of empowering programs for the third of a million Americans who have MS and their families. The Society believes that every individual has the fundamental right to lead a full, productive life via the support of laws that promote equality of opportunity for all citizens. The ADA has proven to be a major advancement in the public awareness of disability rights and has prompted sub-

stantial improvements in local disability regulations. Our expression of interest and support in the present case reflects our commitment to the right of every American to be free from any discrimination and lack of independence under law.

The Paralyzed Veterans of America ("PVA") is a congressionally chartered veterans service organization founded in 1946 with over 20,000 members, all of whom are veterans of the armed forces with spinal cord injury or dysfunction. PVA has developed a unique expertise on a wide variety of issues involving the special needs of its members and uses that expertise to be the leading advocate for civil rights and opportunities which maximize the independence of our members. Virtually all PVA members use wheelchairs for mobility and have a significant interest in the broadest possible implementation and enforcement of the Americans with Disabilities Act of 1990.

The Tennessee Disability Coalition is an alliance of 42 groups and organizations in Tennessee that have joined to promote the full and equal participation of men, women and children with disabilities in all aspects of life. Our member groups are predominately organizations operated by individuals with disabilities or their families. Member agencies represent people of all ages with a wide range of disabilities. Some are disability specific groups, such as paralyzed veterans, cerebral palsy, autism, the Deaf and hard of hearing. Others are directed across disability, but focus on specific issues such as civil rights, independent living, or employment. The Coalition and its member agencies advocate for public policies that ensure self-determination, independence, empowerment, integration and inclusion of individuals with disabilities in all aspects of society. The issues in the *Lane* case are fundamental to protecting the rights of people with disabilities and are therefore central to the Coalition's mission and that of its member agencies.

United Cerebral Palsy Associations, Inc. ("United Cerebral Palsy") is one of the oldest and largest national health organizations dedicated to improving services for people with disabilities. Founded in 1949, the organization advances the independence, productivity and full citizenship

of people with disabilities through a nationwide network of more than 100 affiliates in 37 States and the District of Columbia. United Cerebral Palsy was one of the major leaders in supporting enactment of the Americans with Disabilities Act and has a strong interest in ensuring its applicability to States.

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES IMPOSING RESTRICTIONS ON JURY SERVICE

(Emphasis added throughout.)

ARK. CODE ANN. § 16-31-102 (1987):

Disqualifications.

(a) The following are disqualified to act as grand or petit jurors:

* * *

(2) *Mentally retarded* or *insane* persons;

* * *

(6) *Persons whose senses of hearing or seeing are substantially impaired*;

* * *

1994 Ark. Acts No. 4, § 6:

It is hereby found and determined by the General Assembly that Arkansas Code 16-31-102 disqualifies from acting as a juror any person who is mentally retarded or insane, and any person whose sense of hearing or seeing is substantially impaired; this act eliminates those disqualifications and in their place disqualifies from jury service persons who by reason of a physical or mental disability are unable to render jury services with the exception that no person may be disqualified solely on the basis of loss of hearing or sight; this modification to Arkansas Code 16-31-102 will bring Arkansas law into compliance with federal law; and this act should go into effect immediately in order to allow those persons to begin serving as grand or petit jurors as soon as possible * * * .

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES EXCLUDING STUDENTS WITH DISABILITIES FROM PUBLIC EDUCATION

(Emphasis added throughout.)

DEL. CONST. Art. X, § 1 (1999):

Establishment and maintenance of free public schools; attendance.

Section 1. The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, *not physically or mentally disabled*, shall attend the public school, unless educated by other means.

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES RESTRICTING RIGHT TO MARRY AND FORM FAMILIES

(Emphasis added throughout.)

IND. CODE § 22-1601 (1950):

Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of *insane, feeble-minded or epileptic* persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent, if a lawfully licensed physician and surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution *afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness:* Provided, That

such superintendent shall have first complied with the requirements of this act.

* * *

CAL. CIV. CODE § 4201 (1987):

License; necessity; contents; denial; under age applicants; forms; affidavit.

All persons about to be joined in marriage must first obtain a license therefor, from a county clerk, which license must show all of the following:

* * *

No license shall be granted when either of the parties, applicants therefore, is an *imbecile*, is *insane*, or is, at the time of making the application for the license, under the influence of any intoxicating liquor, or narcotic drug.

D.C. CODE ANN. § 30-103 (1981):

Marriages void from date of decree; age of consent.

The following marriages in said District shall be illegal, and shall be void from the time when their nullity shall be declared by decree, namely: (1) The marriage of an *idiot* or of a person *adjudged to be a lunatic*; * * *

* * *

IOWA CODE ANN. § 595.3 (West 1988):

License.

Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court. Such license must not be granted in any case:

* * *

5. Where either party is *mentally ill or retarded*, a *mental retardate*, or *under guardianship as an incompetent*.

MICH. COMP. LAWS § 551.6 (1990):

Mental or venereal disease; incapacity; validation of white-African marriages; penalty; competency of witness.

* * *

Section 6. No *insane person, idiot, or person who has been afflicted with syphilis or gonorrhea and has not been*

cured of the same, shall be capable of contracting marriage * * * . *No person who has been confined in any public institution or asylum as a feeble-minded, imbecile or insane patient, or who has been adjudged insane, feeble-minded or an imbecile by a court of competent jurisdiction, shall be capable of contracting marriage* without, before the issuance by the county clerk of the license to marry, filing in the office of the county clerk a verified certificate from 2 regularly licensed physicians of this state that such person has been completely cured of such insanity, imbecility or feeblemindedness and that there is no probability that such person will transmit any of such defects or disabilities to the issue of such marriage. *Any person of sound mind who shall intermarry with such insane person or idiot or person who has been so confined as feeble-minded, imbecile or insane patient, or who has been so adjudged insane, feeble-minded or an imbecile*, except upon the filing of certificate as herein provided, with knowledge of the disability of such person, or who shall advise, aid, abet, cause, procure or assist in procuring any such marriage contrary to the provisions of this section, *is guilty of a felony* and on conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than $1,000.00 or by imprisonment in the state prison not less than 1 year nor more than 5 years, or by both such fine and imprisonment.

MICH. COMP. LAWS § 552.1 (1990):

Invalidity of marriages; relationship of parties, bigamy, insanity, idiocy; legitimacy of issue.

Section 1. All marriages, which are prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a wife or husband then living, and all marriages solemnized when either of the parties was *insane* or an *idiot*, shall, if solemnized within this state, be absolutely void. The issue of such marriage shall be deemed legitimate.

* * *

MISS. CODE ANN. § 41-21-45 (1990):

Unlawful to cohabit with feeble-minded.

It *shall be unlawful for any person to cohabit with or attempt sexual intercourse with a female who is feebleminded*, as defined in section 41-19-101, after adjudication of such feeblemindedness.

Anyone convicted of either of these crimes, shall, upon conviction thereof, be punished by a fine of not less than one thousand dollars, or imprisonment of not less than one year in the penitentiary, or by both such fine and imprisonment.

PA. STAT. ANN. tit. 48, § 1-5 (West 1965):

Restrictions on the issue of marriage license.

No license to marry shall be issued by any clerk of the orphans' court.

* * *

(e) If either of the applicants is or has been, within five years preceding the time of the application, *an inmate of an institution for weak-minded, insane, or persons of unsound mind*, unless a judge of the orphans' court shall decide that it is for the best interest of such applicant and the general public to issue the license, and shall authorize the clerk of the orphans' court to issue the license.

R.I. GEN. LAWS § 15-1-5 (1988):

Bigamous marriages void — marriage of lunatics and idiots.

Any marriage when either of the parties thereto, at the time of the marriage, has a former wife or husband living who has not been, by final decree, divorced from such party, and any marriage where either of the parties thereto is *an idiot or a lunatic* at the time of the marriage, shall be absolutely void, and no life estate created by chapter 25 of title 33 shall be assigned to any widow in consequence of the marriage, and the issue of the marriage shall be deemed illegitimate and subject to all the disabilities of illegitimate issue.

VT. STAT. ANN. tit. 15, § 512 (1990):

Voidable marriages — Grounds for annulment generally.

The marriage contract may be annulled when, at the time of marriage, either party had not attained the age of sixteen years or was *an idiot or lunatic* or *physically incapable of entering into the marriage state* or when the consent of either party was obtained by force or fraud.

VT. STAT. ANN. tit. 15, § 514 (1990):

Party an idiot or lunatic.

(a) When a marriage is sought to be annulled on the ground of the *idiocy* of one of the parties, it may be declared void on the complaint of a relative of such idiot at any time during the life of either of the parties.

(b) When a marriage is sought to be annulled on the ground of the *lunacy* of one of the parties, on the complaint of a relative of the lunatic, such marriage may be declared void during the continuance of such lunacy, or after the death of the lunatic in that condition and during the lifetime of the other party to the marriage.

(c) The marriage of a lunatic may be declared void upon the complaint of a lunatic after restoration to reason, but a decree of nullity shall not be pronounced if the parties freely cohabited as husband and wife after the lunatic was restored to sound mind.

(d) If an action is not prosecuted by a relative, the marriage of an idiot or a lunatic may be annulled during the lifetime of both the parties to the marriage, on the complaint of a person admitted by the court to prosecute as the next friend of such idiot or lunatic.

(e) The word "lunatic" as used in sections 511–514 of this title shall extend to persons of unsound mind other than idiots.

W. VA. CODE § 48-2-2 (1990):

For what and when marriages void; affirmation of annulment of marriage.

(a) The following marriages are voidable and shall be void from the time they are so declared by a judgment order of nullity:

* * *

(3) Marriages solemnized when either of the parties:

(A) Was *an insane person, idiot or imbecile*;